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No. 03-1566

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

FRANCIS A. ORFF, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONERS' REPLY BRIEF

HAL S. SCOTT
Of Counsel
HARVARD LAW SCHOOL
1557 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4590

WILLIAM M. SMILAND
Counsel of Record
THEODORE A. CHESTER, JR.
ANI VAKIAN
SMILAND & KHACHIGIAN
601 West Fifth Street
Seventh Floor
Los Angeles, CA 90071
(213) 891-1010

Attorneys for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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INTRODUCTION

The opinion below stands largely undefended. The contracting parties abandon the court's interpretations of the 1963 contract language, and its reason for ignoring the 1986 stipulated judgment. They do not strenuously contest that intended beneficiary status may be implied from circumstances, as well as language. They generally do not deny they intended to benefit the farmers nor that farmers bear the burdens of performance and possess rights to use water at law.

Respondents rest, instead, on four principal grounds, none of which is meritorious. First, the proper test is intent to benefit. There is no second element; any such element would not be applicable; if so, it would be satisfied. Second, 1926 Congressional legislation requiring the Bureau of Reclamation to make contracts with districts does not forbid intended beneficiary status. Third, the operative sovereign immunity waiver statutes do not bar such claims. Fourth, the Bureau is precluded from raising its defenses by prior judgments.

I. THE FARMERS ARE INTENDED BENEFICIARIES OF THE 1963 CONTRACT, AS ENFORCED BY THE 1986 STIPULATED JUDGMENT

A. *The Contract and the Judgment Establish Direct Benefits Sufficient to Confer Intended Beneficiary Status*

Petitioners must show the 1963 contract was intended for their direct benefit. *German Alliance Insurance Co. v. Home Water Supply Co.*, 226 U.S. 220, 230 (1912). The Ninth Circuit acknowledges such "benefit." Pet. App. A at 14a, 14a-15a n.5. Westlands Water District and its *amici* Idaho and Washington farm bureaus do too. WWD Br. 22 n.21, 28-30; Farm Br. 14, 15, 16-18. Benefit is explicit in the language of the 1963 service contract, the 1965 repayment

contract, and each recordable contract. JA 45, 55, 79, 93. These expressions of intent establish intended beneficiary status.

However, the Bureau contends the benefit is not "direct." Bur. Br. 27-28, 29-30 n.13. This contention impermissibly contradicts the Bureau's agreement in each recordable contract that it was made "in consideration of the *direct* and indirect *benefits*" to the landowner under the 1963 contract. JA 93 (emphasis added). U.C.C. § 2-202; *O'Neill v. United States,* 50 F.3d 677, 685 (9th Cir. 1995), *cert. denied,* 516 U.S 1028 (1995).[1]

The requisite intent to benefit is explicitly confirmed in Paragraph 4.2 of the 1986 stipulated judgment, in which the District acknowledges it entered into the 1963 contract for the "benefit" of the pre-merger area lands. JA 111.[2] Respondents make two defective arguments to escape Paragraph 4.2.

First, the Bureau cites two cases for the proposition intent is ascertained when the contract is formed. Bur. Br. 44. Neither involved a second contract in which the parties unambiguously confirmed their intent, manifested in the first, to benefit a third party. A court will look to a second contract to determine the effect the parties gave to the first. *E.g., Trans Ocean Van Service v. United States,* 426 F.2d 329, 336 (Ct.Cl. 1970); *Olson Construction Co. v. United States,* 75 F.Supp. 1014, 1017 (Ct.Cl. 1948). Indeed, a party waives its right to litigate an issue where an agreement resolving it is

[1] The Bureau claims support of an example in a treatise. Bur. Br. 28, 30 n.13. The cases go the other way where the original seller is aware of the ultimate buyer. *E.g., Airplane Sales International Corp. v. United States,* 54 Fed.Cl. 418, 421 (2002); *Riegel Fiber Corp. v. Anderson Gin Co.,* 512 F.2d 784, 787-88 (5th Cir. 1975).

[2] Paragraph 4.3 of the judgment directs the District shall not "modify" the 1963 contract except with the "concurrence" of pre-merger area representatives. JA 112.

incorporated in a judgment. *United States v. Armour & Co.,* 402 U.S. 673, 681-82 (1971).

Second, the Bureau attempts to negate the first sentence of Paragraph 4.2 by means of the second. Bur. Br. 45. The two sentences serve different purposes. The first acknowledges the District entered the contract for the benefit of pre-merger area lands.[3] The second directs the District to enforce the prior rights of lands in that area over those in the merged area.[4]

B. *The Farmers' Direct Benefits Are Coupled With the Burdens of Performance*

Where third persons bear consideration given in exchange for benefits of performance, intended beneficiary status is implied. *E.g., H.F. Allen Orchards v. United States,* 749 F.2d 1571, 1576 (Fed. Cir. 1984), *cert. denied,* 474 U.S. 818 (1985); *Henderson County Drainage District No. 3 v. United States,* 53 Fed.Cl. 48, 52 (2002), *reconsideration denied,* 55 Fed.Cl. 334 (2003). Here, settlers joined the project, as a result of which farmers bear water charges under the 1963 contract, landowners pay land assessments under the 1965 contract, and landowners sell excess lands at without-water prices under recordable contracts. The circumstance of burden buttresses the language of benefit.

The Bureau unsuccessfully distinguishes these cases. Bur. Br. 34, 35 n.15, 40, 43 n.19. The districts in *Allen Orchards*

[3] The first major benefit to such lands was this: "The water service terms of the 1963 Contract will finally be performed by the District and the federal defendants, and the landowners and water users in [the pre-merger area] will now be able to enjoy the benefits to which they are entitled thereunder." AER 27/525.

[4] The second major benefit was this: "Section 37856 of the [Water Code] . . . will finally be honored by the District, and the landowners and water users in [the pre-merger area] will now be able to enjoy the 'prior right with respect to water' to which they are entitled thereunder." *Id.*

signed repayment contracts, before and after a consent decree, and the later contracts incorporated the decree and implied a promise. *H.F. Allen Orchards v. United States*, 4 Cl.Ct. 601, 603, 604, 607, 608, 612 (1984). *Henderson* involved the Corps, rather than the Bureau, and drainage, rather than water, service. But these distinctions make no difference.

C. *The Farmers' Direct Benefits Are Coupled With Property Rights in the Water*

(1) Petitioners argued that, where the third person owns a property interest in the subject of the contract, intended beneficiary status is enhanced, citing *Downey v. Federal Express Corp.*, C-92-4956, 1993 WL 463283 (N.D.Cal. Oct. 29, 1993) and *Allred v. Bekins Wide World Van Services,* 45 Cal.App.3d 984, 989, 120 Cal.Rptr. 312, 314-315 (1975). Pet. Br. 40 n.47. As stated in *Downey,* 1993 WL 463283 at *2, the "purpose" of the contract was to benefit the owner by delivering to him his own property. As observed in *Allred,* 45 Cal.App.3d at 989, such a contract is "obviously" made for the express benefit of the property owner.

Three articles of the 1963 contract refer to farmers' "right" to the "use" of water. JA 36, 43, 45-46. The Ninth Circuit construed these articles as referring to rights against the District, not the Bureau. Pet. Br. 28-29. None of the respondents defends this cramped interpretation.

The Bureau and intervenors Natural Resource Defense Council, *et al.*, note these articles do not "establish" their right to use the water. Bur. Br. 36-39; NRDC Br. 40, 45. But they do recognize that, at law, farmers will acquire that right, once water is applied to their lands. Furthermore, the contract establishes the use right "shall not be disturbed." JA 36.

(2) The 1963, 1965, and recordable contracts incorporate federal reclamation law. JA 30, 31, 64, 82, 92. The proviso of Section 8 of the 1902 act provides that the "right to the use of water" acquired thereunder shall be "appurtenant" to the land irrigated. 43 U.S.C. §§ 372, 485h-4.[5]

This Court holds the "right to the use of water" is a "property right" which becomes "part and parcel of the land" irrigated. *Ickes v. Fox*, 300 U.S. 82, 95-97 (1937); *Nevada v. United States,* 463 U.S. 110, 126 (1983), *reh'g denied*, 464 U.S. 875 (1983).[6] Respondents argue these cases did not involve a California district. Bur. Br. 43; Cal. Br. 4-5, 11-13; NRDC Br. 46. However, federal reclamation law operates uniformly throughout the west. *California v. United States,* 438 U.S. 645, 668 n.21, 672 n.25 (1978).[7]

(3) The 1963 and 1965 contracts also incorporate California law. JA 31, 82. Section 8 provides the act shall not be construed to "interfere" with state law and the Bureau shall "proceed in conformity" therewith, and it contemplates farmers will possess a state water "right" thereunder. 43 U.S.C. §§ 383, 485h-4. Under California law, an appropriative right is usufructuary. *California v. Superior Court,* 78 Cal.App.4th 1019, 1025, 93 Cal.Rptr.2d 276, 281-82 (2000). It is also appurtenant to the land watered. *Fullerton v. State Water Resources Control Board,* 90 Cal.App.3d 590, 598, 153 Cal.Rptr. 518, 523 (1979).

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[5] Under CVPIA Section 3405(a), Pub. L. No. 102-575, 106 Stat. 4706, 4709-12 (Oct. 30, 1992), Congress recognized individual farmers' rights to transfer project water, as NRDC acknowledges. NRDC Br. 35 n.17, 48 n.27. A right to dispose of one's own property is a fundamental aspect thereof. *Phillips v. Washington Legal Foundation,* 524 U.S. 156, 167-68, 170 (1998).

[6] The Bureau's ownership of the water rights is "at most nominal," consisting of "mere title." *Nevada*, 463 U.S. at 126, 127.

[7] NRDC argues these cases are "factually distinguishable," because farmers acquired water rights before the project was built. NRDC Br. 46-47 n.25. As here, each project necessarily involved acquiring and perfecting water rights and making contracts to furnish irrigation water.

In the decisions governing permits issued to the Bureau for the Unit, *amicus* State Water Resources Control Board ruled farmers are the true owners of the usufructuary and appurtenant water right. Pet. Br. 6. Those permits were modified by the State Board in 1978. Decision D-1485, 1978 WL 41190 at 2, 9; *Tulare Lake Basin Water Storage District v. United States*, 49 Fed.Cl. 313, 316 n.3 (2001). When the 1993 and 1994 underdeliveries occurred, the permits, as modified, defined the scope of the state rights and allowed full deliveries. *Tulare*, 49 Fed.Cl. at 321, 322.[8]

The District concludes that all state laws are "not necessarily uniform," and the rule should not be "one-size-fits-all." WWD Br. 15-16 n.15, 23, 37 n.25, 39 n.26, 46. However, water rights in California, as other western states, are founded on the usufructuary and appurtenancy principles.[9]

A district's interest in federal project water is limited or nonexistent. In *Bryant v. Yellen*, 447 U.S. 352, 371 (1980), *reh'g denied*, 448 U.S. 911 (1980), this Court held the water

[8] Respondents state the Bureau "holds" the state water rights. Bur. Br. 41-42; NRDC Br. 41-42; Cal. Br. 4, 9. The interest it holds is "title" to the water right. *Ivanhoe Irrigation District v. All Parties and Persons*, 53 Cal.2d 692, 703-04, 715-16, 3 Cal.Rptr. 317, 323, 330-31 (1960).

[9] The Bureau argues irrigators hold no property right to water under Washington law after *Department of Ecology v. Bureau of Reclamation*, 118 Wash.2d 761, 771, 827 P.2d 275, 281 (1992). Bur. Br. 34-35 n.15. The claimant there had improperly attempted to appropriate, without having any contract, previously appropriated project water. The court said nothing about the property rights of farmers benefitted by contracts with the Bureau. The year before it had held such farmers owned usufructuary and appurtenant water rights. *Neubert v. Yakima-Tieton Irrigation District*, 117 Wash.2d 232, 237, 814 P.2d 199, 201-02 (1991) (en banc). The Bureau also cites *Israel v. Morton*, 549 F.2d 128, 132 (9th Cir. 1977), for the proposition end users in a federal project do not acquire appropriative rights which transcend contractual terms. Bur. Br. 42. There, the landowner's excess land was "not . . . entitled to project water and has never received any." *Israel*, 549 F.2d at 132.

right was "equitably owned by the beneficiaries" to whom the district was obligated to deliver water. The question of what interest the district in the *Nevada* case owned was resolved in *Truckee-Carson Irrigation District v. Secretary of Department of Interior*, 742 F.2d 527, 530-31 (9th Cir. 1984), *cert. denied*, 472 U.S. 1007 (1985). The court ruled it held "no right to the water itself." *Id.* Its purely contractual right was to manage facilities.

The District nevertheless insists it "owns" water rights under two California statutes,[10] citing first Water Code Section 35428 (no water or right owned by district shall be acquired by permitted use). WWD Br. 36. This statute has been applied to bar a claim by a temporary user of water outside a district. *Ivanhoe Irrigation District v. All Parties and Persons*, 47 Cal.2d 597, 645-46, 306 P.2d 824, 853-54 (1957), *rev'd on other grounds, Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275 (1958).

The District also cites Water Code Section 35602 (dedicates for district purposes the water and water rights within it). WWD Br. 34-35. This cryptic statute has not been judicially construed, and says nothing about the respective property interests among the Bureau, a district, and its farmers.

The State Board argues, for the first time, farmers have "no property interest" in the water. Cal. Br. 3, 4, 5, 10, 11, 13. Its arguments differ from the District's, but are also unconvincing.

First, the State Board claims *Ivanhoe*, 53 Cal.2d at 715-16, held farmers had no property right. Cal. Br. 3, 13. Instead, the court confirmed the validity of reclamation contracts. *Ivanhoe*, 53 Cal.2d 715-16. It did not explicate farmers' water rights.

[10] The District's arguments were not raised below and, therefore, should not be considered here. *Ryder v. United States*, 515 U.S. 177, 184 n.4 (1995); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38-39 (1989).

The State Board next cites *Erwin v. Gage Canal Co.*, 226 Cal.App.2d 189, 194, 37 Cal.Rptr. 901, 903 (1964), for the proposition that farmers' interests are not property. Cal. Br. 10-11. But, as this Court noted in *Bryant*, *Erwin* established that landowners have a legally enforceable right, appurtenant to their lands, for continued service. 447 U.S. at 371 n.23.

The State Board notes a water right is subject to change of place of use under Water Code Sections 1701 and 1702, arguing this procedure is "inconsistent" with recognition of farmers' water rights. Cal. Br. 9-10 n.5, 13. This is incorrect where the owner, rather than a government agency, has the right to effect the change of place of use. In any event, during the years in question here, no such change had occurred.

The State Board argues the state appurtenancy principle establishes only a "restraint on out-of-project transfers." Cal. Br. 3-4, 7. Sections 1701 and 1702 do not address the respective property interests among the participants in a federal reclamation project, nor do they abrogate the usufructuary or appurtenancy principles.

Finally, the State Board contends the District was not a "legal user" of water and, thus, could not claim "injury" barring a change of place of use under Section 1702. Cal. Br. 7-8. But a farmer is a user of water, and reallocating half of the supply to the Pacific Ocean causes him or her injury.[11]

The divergent arguments of the District and State Board fail to account for other rules governing farmers' rights.

[11] Respondents rely heavily on D-1641. Bur Br. 42; Cal. Br. 6 n.3, 7-9, 8 n.4, 9-10 n.5; NRDC Br. 41 n.20, 42 n.21, 45 n.24. This reliance is misplaced. The State Board explicitly declined to address any federal contract claims against the Bureau. Revised Decision D-1641, 1999 WL 1678482 at 81, 85. Furthermore, D-1641 was not in effect when the underdeliveries occurred, farmers were not parties to the State Board's proceedings, and the trial court decision upholding D-1641 is still on appeal.

Respondents disregard Water Code Section 37856 (lands in pre-merger area shall have a right with respect to water to which the District is entitled under the 1963 contract), Water Code Section 23200 (water shall be distributed and apportioned by a district in a federal project in accordance with acts of Congress and provisions of the federal contract), and *California,* 438 U.S. at 668 n.21, 670, 672, 674-79 (state law which is inconsistent with a Congressional directive is preempted).

D. *No Second Prong to the Intended Beneficiary Test Bars the Farmers' Claims*

(1) The Bureau cites *Restatement (Second) of Contracts* Section 313(2)(a) (where promisor contracts with a "government," it is not liable to a "member of the public," unless the terms of the promise "provide for such liability"), arguing the 1963 contract must have explicitly granted petitioners "the right to enforce" it. Bur. Br. 25, 26, 28, 29, 32, 35, 36, 39, 40, 41, 43, 45.

In *German Alliance* this Court announced the intent to benefit test, and applied it to the facts. The contract did not express the parties made it for the building owners' benefit. They had no contract right against the city for water service. And they had no property interest in the water purchased by the city. Instead, their benefit was incidental, like that enjoyed by all city residents to all city services. The Court did not formulate a second prong requiring enforcement rights. To the same effect is *H.R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 164-66, 159 N.E. 896, 897-98 (1928).

The notion of a second prong arose in the claims court decision in *Allen Orchards*, 4 Cl.Ct. at 609, 610 (parties had to manifest "the specific intent to give the individual an enforceable right"). This conclusion was rejected by the Federal Circuit, *Allen Orchards,* 749 F.2d at 1576, which ruled farmers were intended beneficiaries based on circumstances satisfying the intent to benefit test.

In *Schuerman v. United States,* 30 Fed.Cl. 420, 428 (1994), the claims court held the second prong "consistently has been misapplied and without analysis has been accepted" in the Federal Circuit. Jurisdiction has been constricted "without a reason in law or binding precedent to justify it." *Id.* The court held the proper test is the intent to benefit test, citing *German Alliance. Id.* at 433. The Federal Circuit now holds that the appropriate test includes "only the first prong." *Montana v. United States,* 124 F.3d 1269, 1273-74 (Fed. Cir. 1997).

The supposed second element is effectively subsumed under the intent to benefit test and, therefore, unnecessary. Promises intended to benefit third persons create a "duty" in the promisor to the intended beneficiary, and he or she may "enforce" that duty. *Restatement (Second) of Contracts* § 304.[12]

Furthermore, the intended beneficiary rule is an "exception" to the traditional rule that only a signatory may sue. *German Alliance,* 226 U.S. at 230. Rarely, if ever, do contracting parties manifest intent to confer on intended beneficiaries specific remedies for enforcing the rights.[13] A second enforcement prong would effectively reinstate the outmoded citadel of privity and nullify the *German Alliance* test.

(2) Were there a second enforcement prong, it would not be applicable here. Farmers are not members of the public, as respondents contend. Bur. Br. 26, 32; WWD Br. 45-46; NRDC Br. 26, 27.

The farmers were a defined class of persons intended to benefit from the Bureau's performance. Where any government is given a promise which specially benefits a defined class,

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[12] The Bureau acknowledges the obligation, and must not be allowed to deny its enforceability. *De La Rama S.S. Co. v. United States*, 344 U.S. 386, 390 (1953) ("Legal obligations that exist but cannot be enforced are ghosts . . . that are elusive to the grasp"(citation omitted)).

[13] The state farm bureaus persuasively contend the burden of meeting any second element could rarely be met. Farm Br. 14-15.

the beneficiaries are not mere members of the public. *E.g., Iacampo v. Hasbro, Inc.,* 929 F.Supp. 562, 578, 580-81 (D.R.I. 1996) (employer's promise to state it would not discriminate against women or disabled in employment may be enforced by employee injured by breach, if state "specifically had her [class] in mind"); *New York Citizens Committee on Cable TV v. Manhattan Cable TV, Inc.,* 651 F.Supp. 802, 815-17 (S.D.N.Y. 1986) (subscribers were intended beneficiaries of promises made to city by cable television company, because each enjoys "special benefit . . . in contrast to any benefit he enjoys as a member of the public generally").[14]

Furthermore, the District is not the type of "government" which would trigger any second element. It has been called a "middleman," and a district has been referred to as a "surrogate" or "intermediary." Pet. Br. at 44.[15] The District asserts it is not a "mere pass-through" entity. WWD Br. 39, 41. But it does not distinguish the cited authority, nor offer any to the contrary.

Petitioners also cited *Ball v. James,* 451 U.S. 355, 366-72 (1981) (districts are public entities only in "nominal" sense), and *Salyer Land Co. v. Tulare Lake Basin Water Storage District,* 410 U.S. 719, 728-29 (1973) (district does not exercise "normal governmental" authority). Pet. Br. 44-45. The District responds *Ball* and *Salyer* expressed "institutional respect" for water districts. WWD Br. 39-40. That does not alter the fact their governmental powers are limited. The

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[14] *Accord*: *Koch v. Consolidated Edison Co. of New York, Inc.*, 62 N.Y.2d 548, 559, 468 N.E.2d 1, 7 (1984), *cert. denied*, 469 U.S. 1210 (1985); *Zigas v. Superior Court*, 120 Cal.App.3d 827, 834-40, 174 Cal.Rptr. 806, 809-13 (1981), *cert. denied*, *Sangiacomo v. Zigas*, 455 U.S. 943 (1982).

[15] The Secretary of Interior referred in 1926 to a district as a "medium" for conducting financial dealings between farmers and the Bureau. H.R. Rep. No. 69-617, at 12, 16 (1926) (letters from Secretary Work to Chairman of Committee on Irrigation and Reclamation).

District also contends it is a "real" government, as it was formed under state law, is a public agency of the state, and may exercise powers such as eminent domain and issuance of general obligation bonds. WWD Br. 37-38, 41. But it has a "special limited purpose." *Salyer,* 410 U.S. at 728. Water functions are its "primary purpose." *Ball,* 451 U.S. at 364. Its reason for being is to "protect" and "serve" its farmers' property interests. *Henderson*, 53 Fed.Cl. at 50.

(3) Finally, if there were a second element, and if it applied here, the parties to the 1963 contract did intend that farmers would have enforcement rights. They referred in three articles to "those" or "anyone" having or claiming a right or remedy "through, or under" the District. JA 41, 43, 44. Respondents identify no such persons, nor do they defend the Ninth Circuit's conclusion that the only such persons are assignees. Pet. Br. 30-31.[16]

Paragraph 3 of the 1986 stipulated judgment definitively confirms farmers' enforcement rights. It declares that "any other appropriate relief may be obtained against the Federal parties by the filing of a new action for violation of . . . any

[16] The Bureau argues the Court should be "reluctant" to recognize intended beneficiary status absent "express" provision in the contract, citing this Court's jurisprudence on private rights of action under statutes, *e.g., Gonzaga University v. Doe,* 536 U.S. 273, 279-84 (2002). Bur. Br. 32-33. This argument is faulty. Such cases do not involve suits against the United States for breach of a commercial contract. In that context, intended beneficiary status may be implied. *German Alliance,* 226 U.S. at 232 (reviewing claim raised by "implication"); *Schuerman,* 30 Fed.Cl. at 433 (proper test is express or "implied" intention, citing *German Alliance*). It may be found in surrounding circumstances. *Hendrick v. Lindsay,* 93 U.S. 143, 147 (1876) (language should be considered in connection with "surrounding circumstances"). Federal supply contracts are construed and enforced like private contracts. *Mobil Oil Exploration and Producing Southeast, Inc. v. United States*, 530 U.S. 604, 608-09 (2000); *United States v. Winstar*, 518 U.S. 839, 887 n.32, 895 n.39 (1996) (Souter, J., plurality), 912 (Breyer, J., concurring).

contract or other right or obligation arising independently of this Judgment . . ." JA 110. As stated in the court-approved settlement notice, this makes rights of pre-merger area farmers under the 1963 contract "directly enforceable." AER 27/528.

The Bureau suggests the phrase "any contract or other right or obligation" may not refer to the 1963 contract. Bur. Br. 45. No basis for this casual suggestion exists. A review of the judgment and the settlement notice reveals that paramount among the obligations referred to in Paragraph 3 were those owed under that contract.[17]

E. *Prior Judgments Preclude the Bureau From Challenging Intended Beneficiary Status*

The Bureau is barred from denying intended beneficiary status by several prior adjudications under the doctrines of issue preclusion, *United States v. Stauffer Chemical Company,* 464 U.S. 165, 168-69 (1984); *Durfee v. Duke,* 375 U.S. 106, 110-12, 116 (1963); *United States v. Moser,* 266 U.S. 236, 241-42 (1924), and claim preclusion, *Nevada,* 463 U.S. at 128-35; *Chicot County Drainage District v. Baxter State Bank,* 308 U.S. 371, 378 (1940), *reh'g denied*, 309 U.S. 695 (1940). Pet. Br. 48-49.

The Bureau claims Paragraphs 3 and 4.2 of the 1986 stipulated judgment are not issue-preclusive, because the parties resolved the issue "without reaching the merits." Bur. Br. 47. The judgment did reach the merits. Paragraph 4.2

[17] NRDC argues the opening clause of Paragraph 3 limits enforcement rights to specific performance. NRDC Br. 50. The words on which it relies precede, and those on which petitioners rely follow, the word "provided." *Quackenbush v. United States,* 177 U.S. 20, 26 (1900) (proviso modifies main clause). Furthermore, the proviso here allows "any other appropriate relief," which surely includes the default remedy of damages. *Winstar,* 518 U.S. at 885 (Souter, J., plurality), 919-20 (Scalia, J., concurring).

confirmed the admittedly required intent to benefit the farmers. If enforcement rights were a second element, and it was applicable, Paragraph 3 expressly confirmed them.

As to claim preclusion, the Bureau contends the claims asserted in prior cases "differed" from those asserted here. Bur. Br. 46-47. In fact, the prior claims also alleged overcharges or failures to provide service. The Bureau further argues the prior litigations "sought enforcement of the 1986 Judgment" and, therefore, this case is "unlike" them. Bur. Br. 48-49. A suit to enforce the contract and a motion to enforce the judgment (which commands the Bureau to perform the contract) charge breach of the same quantity and price obligations.[18]

II. CONGRESS DID NOT ABROGATE THE INTENDED BENEFICIARY RULE IN SECTION 46 OF THE 1926 ACT

Section 46 of the Omnibus Adjustment Act of 1926, 43 U.S.C. § 423e, provided, in part, as follows: "No water shall be delivered . . . until a contract . . . shall have been made with an irrigation district . . . organized under State law providing for payment by the district . . . of the cost of . . . the works . . ." The Bureau assumes, without demonstrating, the 1963 contract was made under Section 46. It claims the statute "expressly limits" its "authority" to create intended beneficiary status, and such status is "inconsistent with Congress's objective" in requiring district contracts. Bur. Br. 17-20. This alternative defense was neither raised nor ruled upon below. It is also erroneous.

[18] The Bureau argues the farmers "waived" their preclusion argument "by failing to present it to the district court." Bur. Br. 46. In fact, the farmers presented preclusion twice. ASSER 1/1, 11-12, 13-14, 14-16, 16-18, 30; 2/3-4.

A. *Neither the Language Nor Legislative History of Section 46 Supported Abrogation*

The language of Section 46 said nothing explicit about the intended beneficiary rule, nor did it expressly limit any rights arising from a district contract or any remedies for its breach.

Section 46 required the Bureau to make a "contract" with a district. Where Congress uses a legal term with settled meaning under common law, a court must infer, unless otherwise specified, Congress incorporates that meaning. *Beck v. Prupis*, 529 U.S. 494, 500-01 (2000) ("conspiracy"); *Morissette v. United States*, 342 U.S. 246, 263 (1952) ("conversion"); *State Engineer v. South Fork Band*, 339 F.3d 804, 813-14 (9th Cir. 2003) ("jurisdiction"). The term "contract" at common law embraces the intended beneficiary rule. A court will not infer a Congressional statute abrogates a common law contract rule. *United States v. Texas*, 507 U.S. 529, 534-35 (1993) (act does not relieve promisor of common law duty to pay prejudgment interest); *Cecile Industries, Inc. v. Cheney*, 995 F.2d 1052, 1054-56 (Fed.Cir. 1993) (same act does not abrogate common law contractual offset rights). Here, nothing in Congress' use of the word "contract" implied an intent to abrogate any contract rule, including the intended beneficiary rule. Instead, Congress intended to incorporate the entire law of contract.

The purpose of Section 46 was simply to provide for "payment" by a district of the "cost" of the project, with such "costs" being "repaid" within a certain time. 43 U.S.C. § 423e. The change was designed to make the liability of every farmer joint. WWD Br. 17, 19; NRDC Br. 30-31 n.14. Section 46 did not refer to the water delivery side of a contract.[19]

[19] The District argues this action is "collaterally attacking" its litigation decisions. WWD Br. 5-6, 24, 35, 42. Petitioners' suit does not challenge any litigation decisions of the District in this or any other case. It also

Courts which addressed the purpose of contracting with a district concluded it is "convenience" and "administrative expediency." Pet. Br. 33-34. Section 48 of the 1926 act, 43 U.S.C. § 423f, stated its purpose was rehabilitating projects and placing them on a sound operative and business basis. *Yellen v. Hickel,* 335 F.Supp. 200, 204 (S.D.Cal. 1971), *rev'd on other grounds,* 559 F.2d 509 (9th Cir. 1977), *on reh'g,* 595 F.2d 524 (9th Cir. 1979), *rev'd and vacated in part sub nom., Bryant,* 447 U.S. 352, found its purpose was to provide relief to settlers, not to change the policy of reclamation law. This authority is not addressed by respondents.[20]

B. *The 1963 Contract Was Made Under Section 9(e) of the 1939 Act*

Congress authorized the Bureau to make water service contracts in Section 9(e) of the Reclamation Project Act of 1939, 43 U.S.C. § 485h(e). Respondents acknowledge the 1963 contract is a Section 9(e) contract. Bur. Br. 5-6 n.2; NRDC Br. 6, 47. However, respondents insist that, even after 1939, the Bureau's authority was limited to contracting "only" with a district. Bur. Br. 4, 5-6 n.2, 7, 17; WWD Br. 16, 34; NRDC Br. 30-31.

Section 9(e) of the 1939 act authorizes the Bureau "[i]n lieu of entering a repayment contract" to enter "contracts to furnish water for irrigation purposes." 43 U.S.C. § 485h(e).

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claims its "discretion regarding which landowners will receive what amount of water" might be impaired. WWD Br. 24, 35. Recognizing intended beneficiary status in a suit against the Bureau would have no effect on the District's internal allocation powers, which are defined by state law. Cal. Water Code §§ 23200, 35421, 37856; *Ivanhoe,* 53 Cal.2d at 709-11.

[20] The Bureau's attempts to raise lack-of-authority defenses in reclamation contract cases have previously been rejected. *E.g., United States v. Coachella Valley County Water District,* 111 F.Supp. 172, 179, 180 (S.D.Cal. 1953); *Central Arizona Water Conservation District v. United States,* 32 F.Supp.2d 1117, 1141, 1143 (D.Ariz. 1998).

It does not direct the Bureau to contract with a district. It authorizes the Bureau to make a service contract with "private landowners or organizations." *Flint v. United States,* 906 F.2d 471, 475 (9th Cir. 1990) (Bureau contracts with landowners to furnish irrigation water).[21] Nothing in Section 9(e) suggests Congress intended to limit the Bureau's authority to make farmers intended beneficiaries. Indeed, it was given authority to make service contracts directly with farmers.[22]

III. NEITHER OF THE APPLICABLE SOVEREIGN IMMUNITY WAIVER STATUTES BARS SUITS BY INTENDED BENEFICIARIES

Petitioners claim sovereign immunity was waived under both Section 208(a)(2) of the Act of July 10, 1952, 43 U.S.C. § 666(a)(2), and Section 221 of the Reclamation Reform Act of 1982, 43 U.S.C. § 390uu. Respondents argue that, even if petitioners are intended beneficiaries, those statutes do not waive immunity. Bur. Br. 20-25; WWD Br. 24-25, 43-47; NRDC Br. 14-23.

Generally, statutes waiving immunity for contract claims are construed to embrace intended beneficiary claims. For

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[21] In 1956, Congress further directed, in administering the 1939 act, the Bureau shall provide the other "party" to a service contract shall have a first right to a stated quantity of water for use on irrigable lands "within the boundaries of, or owned by," the party. 43 U.S.C. § 485h-1(4).

[22] The 1979-1986 litigation involved underdelivery and overcharge claims under the 1963 contract by farmers against the Bureau. Two subsequent suits raised claims under its price terms. *Barcellos & Wolfsen, Inc. v. Westlands Water District,* 899 F.2d 814, 816, 824-25 n.17 (9th Cir. 1990), *cert. denied, Boston Ranch Co. v. Department of Interior,* 498 U.S. 998 (1990); *United States v. Westlands Water District,* 134 F.Supp.2d 1111, 1117-18, 1138-39 (E.D.Cal. 2001). Two others involved claims under its service terms. *O'Neill,* 50 F.3d at 682; *Sumner Peck Ranch, Inc. v. Bureau of Reclamation,* 823 F.Supp. 715, 745 (E.D.Cal. 1993). In none of these cases did the Bureau raise its novel Section 46 defense. Thus, respondents' argument is barred by claim preclusion.

example, the claims court has long entertained claims against the United States founded upon any express or implied contract. 28 U.S.C. § 1491(a)(1). This statute is construed to allow suits by intended beneficiaries. *E.g., Maneely v. United States,* 68 Ct.Cl. 623, 629 (1929). Similarly, certain such contract claims may be brought in district court. 28 U.S.C. § 1346(a)(2). This statute, too, embraces intended beneficiary claims. *E.g., United States v. Huff,* 165 F.2d 720, 723-24, 725 (5th Cir. 1948).[23]

A. *Section 208(a)(2) of the 1952 Act Does Not Bar Petitioners' Suit*

In Section 208(a)(2) of the 1952 act, consent is given to join the Bureau as a defendant "in any suit . . . for the administration" of previously adjudicated "rights to the use of water" of a source where it acquires water rights by appropriation under state law. NRDC argues this statute does not extend to petitioners' claims. NRDC Br. 11,12,14 n.6, 18-19.

The previously-adjudicated water rights covered by Section 208(a)(2) are "all-inclusive." *United States v. District Court,* 401 U.S. 520, 524 (1971). Furthermore, a suit for the administration of such rights includes any proceeding to interpret or enforce them. *E.g., Federal Youth Center v. District Court,* 195 Colo. 55, 60-62, 575 P.2d 395, 398-400 (1978); *United States v. Hennen,* 300 F.Supp. 256, 263-64 (D.Nev. 1968). The statute is presumed not to repeal by implication any of the common law's deeply-rooted doctrines. *South Fork Band*, 339 F.3d at 814. Indeed, in the litigation resolved by the 1986 stipulated judgment, the court held that Section 208(a)(2) waived immunity. *Barcellos & Wolfsen, Inc. v. Westlands Water District*, 491 F.Supp. 263, 266 n.2, 267 (E.D.Cal. 1980). Accordingly, petitioners'

[23] One court has similarly assumed without deciding that the word "contractor," as used in 41 U.S.C. § 601(4), includes an intended beneficiary. *Hodgdon v. United States*, 919 F.Supp. 37, 39 n.2 (D.Maine 1996).

claims are within the scope of that waiver.

B. *Section 221 of the 1982 Act Does Not Bar Petitioners' Suit*

In Section 221 of the 1982 act, Congress consented to suit to adjudicate "the contractual rights" of a "contracting entity" and the Bureau regarding any "contract" executed under reclamation law. It was intended to provide a "broad" waiver of immunity. *Tacoma v. Richardson,* 163 F.3d 1337, 1340 (Fed. Cir. 1998); *Westlands,* 134 F.Supp.2d at 1156 n.97.[24] It, too, incorporates the federal common law of contract, including the intended beneficiary rule. *Texas,* 507 U.S. at 534.

The legislative history of Section 221 shows it was intended to extend consent to farmers within a district. Pet. Br. 12 n.24. Respondents disagree, citing *Wyoming v. United States,* 933 F.Supp. 1030, 1039 (D.Wyo. 1996). Bur. Br. 22; WWD Br. 45 n.28. The claimant there was not a farmer within the contracting district, but a neighboring district. Furthermore, Representative Miller, in support of the Conference Committee Report, stated: "This new law also permits landowners to sue the United States by waiving sovereign immunity." 128 Cong. Rec. H7987 (September 29, 1982).[25] This issue has been resolved against the Bureau. *Sumner Peck Ranch*, 823 F.Supp. at 746.

Respondents also argue Section 221 only allows a party to join the Bureau in a "ongoing" suit between a district and its members. Bur. Br. 21-23; NRDC Br. 15-20. The argument

[24] "In making these contracts, the Government is acting in a proprietorial capacity and not in a sovereign capacity and there is no reason why it should be permitted to defeat a valid claim by pleading sovereign immunity." 128 Cong. Rec. H1832 (May 5, 1982) (Rep. Kazen).

[25] The House and Senate versions of the bill had the same intent: "Even though we substituted language which was taken from the House bill, that sentiment and purpose is still applicable to the House language . . ." 128 Cong. Rec. S8507 (July 16, 1982) (Sen. McClure).

has been made before, and rejected. *Sumner Peck Ranch*, 823 F.Supp. at 745-46. Any such reading of the first sentence is "belied" by the second, which waives immunity when the Bureau is a "party to any suit." *Id.* at 745.

Respondents finally argue Section 221 does not extend to claims seeking money damages. Bur. Br. 23-25; NRDC Br. 20-21. Again, this contention has been rejected. *Sumner Peck Ranch*, 823 F.Supp. at 746-47. The language of the statute (Bureau subject to judgments "in the same manner as a private individual under like circumstances") embraces any remedy. *Id.* at 746. Indeed, the House-Senate conferees agreed Section 221 is not prejudicial to "any particular . . . remedy under existing law." H.R. Conf. Rep. No. 97-855, at 33 (1982).[26]

CONCLUSION

The Court should reverse the holdings below (a) determining petitioners are not entitled to sue and (b) vacating the partial merits rulings, and it should remand the case to the Ninth Circuit with direction to review, or otherwise dispose of, the partial merits rulings.

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[26] In the 1979-86 litigation the court explicitly held farmers could sue the Bureau for underdelivery and overcharge claims under Section 208(a)(2). *Barcellos & Wolfsen*, 491 F.Supp. at 266 n.2, 267. In a subsequent case, the court held farmers had standing under Section 221, their suit need not be an ongoing action against the District, and they could seek money damages. *Sumner Peck Ranch*, 823 F.Supp. at 746-47. Thus, the Bureau may not relitigate either sovereign immunity defense here. Furthermore, claim preclusion bars the government from a belated assertion of sovereign immunity. *United States v. County of Cook*, 167 F.3d 381, 385-90 (7th Cir. 1999), *cert. denied*, 528 U.S. 1019 (1999). The Bureau is so barred, because it failed to assert its immunity defenses in several prior cases.

Respectfully submitted,

HAL S. SCOTT
Of Counsel
HARVARD LAW SCHOOL
1557 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4590

WILLIAM M. SMILAND
Counsel of Record
THEODORE A. CHESTER, JR.
ANI VAKIAN
SMILAND & KHACHIGIAN
601 West Fifth Street
Seventh Floor
Los Angeles, CA 90071
(213) 891-1010

Attorneys for Petitioners

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